Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Steven Spragg et al.,

complainant,

and

The London Technical Employees Association,

respondent,

and

Rogers Cable Communications Inc.,

employer.

Board File: 28821-C
Neutral Citation: 2011 CIRB 610
October 14, 2011

The Board was composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members.

Parties' Representatives of Record

Steven Spragg et al., for themselves;
Jennifer L. Costin, for The London Technical Employees Association;
Mr. Brian P. Smeenk, for Rogers Cable Communications Inc.

I–Nature of the Application

[1] On June 17, 2011, nine home entertainment specialist technicians (the HES technicians or the complainants) working for Rogers Cable Communications Inc. (Rogers or the employer) in London, Ontario, filed a complaint pursuant to section 37 of the *Canada Labour Code (Part I–Industrial Relations)* (the *Code*) against The London Technical Employee Association (LTEA or the union), alleging that the union had acted in an arbitrary and bad faith manner and thereby breached the duty of fair representation it owed to them.

[2] This complaint was considered by a panel of the Board composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. André Lecavalier and Norman Rivard, Members. Having reviewed the written submissions of the parties, the Board has exercised its discretion pursuant to section 16.1 of the *Code* to decide this complaint without an oral hearing.

II–Background

[3] The LTEA was voluntarily recognized by the employer some 30 years ago to represent a group of Rogers' technical employees working in London, Ontario. Over the years, the parties negotiated successive collective agreements. On March 12, 2010, the LTEA applied to the Board to be recognized as the certified bargaining agent pursuant to section 24.1 of the *Code* (Board file 28017-C). At that time, the union and the employer were parties to a collective agreement for the period from November 1, 2005 to July 31, 2010 which, among other things, provided as follows:

> It is agreed that the Technical Employees Association represents all non-management-level technical positions listed on the TEA wage scales, in addition to piecework Home Entertainment Specialists (HES). The TEA Agreement supersedes HES Terms and Conditions for all non-compensation items. All future technical positions if based out of the London office will be included or not included in the listing through meeting and consultation with the T.E.A Executive.
>
> ...
>
> The Company recognizes the integrity of the bargaining unit and the Executive's responsibility to negotiate a contract that provides for future job security. Home Entertainment Specialists (HES) are

included in the membership of the TEA. They are paid 100% commission, based on Rogers HES pay structure. The Company will consult with the Executive and provide notice of rate changes 30 days prior to implementation.

[4] The LTEA's application for certification proposed the following bargaining unit description:

> All employees of Rogers Cable Communications Inc. employed at or from its 800 York Street, London, Ontario location classified as Material Handlers, Service Technicians, Construction Technicians, System Planners, Network Field Technicians, Maintenance Technicians, Headend Technicians, Platform Technicians and Home Entertainment Specialist Technicians.

[5] The application noted that Home Entertainment Specialists operate under different terms and conditions of employment, as set out in a separate document from Rogers dated August 19, 2009.

[6] Following investigation of the application, the Board found the LTEA to be a trade union within the meaning of the *Code* and on May 18, 2010, issued order no. 9868-U certifying the LTEA pursuant to section 28 of the *Code* as the bargaining agent for a unit composed of:

> ... all employees of Rogers Cable Communications Inc. employed at or from its 800 York Street, London, Ontario location, classified as material handlers, service technicians, construction technicians, system planners, network field technicians, maintenance technicians, headend technicians, platform technicians and home entertainment specialist technicians.

[7] The union and the employer subsequently met in collective bargaining and in May 2011 reached a collective agreement covering the period August 1, 2010 to July 31, 2015. Article 2 of that collective agreement, entitled "Recognition", contains the following provisions:

> 2.01 It is agreed that the Technical Employees Association represents all non-management-level positions listed in the CIRB Certificate No. 9868-U.
>
> 2.02 As a certified Association, the process of inclusion or exclusion of current or future classifications must be made by application to the CIRB.
>
> ...
>
> 2.04 The Company recognizes the integrity of the bargaining unit and the Executive's responsibility to negotiate a contract that provides for future job security.

[8] At some point subsequent to the signing of this collective agreement on May 18, 2011, the HES technicians became aware that the union had purposely left the term "HES" out of the new collective agreement. They filed this duty of fair representation complaint on June 17, 2011.

III–Positions of the Parties

A–The HES Technicians

[9] The HES technicians state that they were told, prior to the union's 2010 application for certification, that they could not be included in the bargaining unit. However, the union did include the HES technicians in the certification application and the bargaining unit for which the union was certified included the HES technicians. The applicants wish to be represented by the LTEA and contend that the union has acted in an arbitrary and bad faith manner by failing to include any reference to them in the new collective agreement.

B–The LTEA

[10] The LTEA indicates that, prior to certification in 2010, the HES technicians were paid on a piecework basis. As a result, 100% of their income came from commissions. The LTEA states that these employees were subject to employment terms and conditions established by Rogers which superceded any rights provided to them in the collective agreement for all compensation related issues. Specifically, the terms and conditions for HES technicians that were unilaterally established by Rogers related to remuneration, short and long term disability benefits, approved paid leave, work schedules, overtime, vacation, statutory holidays, floater days, probationary period and performance management.

[11] The union advises that, in August 2009, Rogers had adjusted the HES piecework rates downwards by 30%. However, at approximately the same time, the employer made a one-time offer allowing each of the HES technicians to opt to be converted to a service technician and be paid a salary as of January 1, 2010. Those who did not elect to convert would continue to be paid on a piecework basis in accordance with the employer's "HES Terms and Conditions" document. A letter

of understanding to this effect was signed by the LTEA and Rogers, and ultimately some 14 of the 23 HES technicians opted to convert to salaried service technician positions.

[12] In its response to the complaint, the LTEA states the following:

> It had been [L]TEA's long held belief that it had difficulty negotiating on behalf of HES workers who were compensated 100% by commission, as any issues of any importance related ultimately to money and as a result, were not in its authority to negotiate. When [L]TEA proposed certifying itself, it also expressed to its membership its concern about the effectiveness of it to negotiate on behalf of commission paid HES workers. As a result, through the negotiation of the Letter of Understanding at Schedule 4 and its presentation to [L]TEA members, [L]TEA met with HES workers as a group and its membership as a whole on at least two separate occasions to communicate its concern about its ability to effectively negotiate on behalf of HES commission paid members and suggested that once the certification process was finalized it would turn its mind to removing HES commission paid workers from its bargaining unit.

[13] The union states that HES workers were advised to factor the union's concerns about its ability to represent them into their decision as to whether to elect to convert to the salaried positions. The LTEA states that, at a general meeting held on June 29, 2010, it informed all of its members that it intended to remove the HES technicians from the bargaining unit. The union admits that, at its first collective bargaining meeting with Rogers in September 2010, it informed the employer of its intent to remove the HES technicians from its bargaining unit.

[14] The LTEA states that, during negotiations, Rogers took the position that it wanted to continue to have the "HES Terms and Conditions" govern that group of employees. The LTEA states that it attempted to negotiate for the benefit of the HES technicians, but that Rogers took the position that compensation for these workers was outside of the LTEA's authority to negotiate. The LTEA states that three of the nine HES technicians attended the ratification meeting held on May 19, 2011 and all were in favour of the agreement that had been reached.

[15] The LTEA denies that it ever advised the HES technicians that they had to be removed from the bargaining unit before it could be certified by the Board. It states that the HES technicians participated in the membership vote that was held to determine whether the union would apply for certification.

[16] The LTEA submits that it turned its mind to the amount of dues being paid by the HES technicians and the services it was able to provide to them. It is of the view that it does not represent a cohesive body for which it can negotiate with Rogers at its maximum effectiveness, given the varying nature of compensation between HES technicians and the balance of the bargaining unit. In considering where to best direct its efforts and resources and the service it can provide for the dues paid, the LTEA states it gave significant consideration to all of the employees and various groups of employees' interests and attempted to balance those as best as it could. It states that it did so not for an improper purpose, or with personal feelings of hostility, ill will, deceitfulness or dishonesty, but rather in considering what choice would best represent its members in its entirety.

[17] The LTEA argues that the complaint is premature, since the union has not yet applied to the Board to have the HES technicians removed from its bargaining unit. In the LTEA's submission, it has therefore not carried out any actions that can be viewed as unfair representation of the HES technicians. However, the LTEA also argues that the complaint is untimely, since the certification order was issued on May 18, 2010, more than one year prior to the date of the complaint and therefore well beyond the 90-day time limit set out in section 97(2) of the *Code*.

[18] Furthermore, the LTEA argues, the new collective agreement incorporates the HES technicians by the reference to certification order no. 9868-U contained in section 2.01. It therefore argues that the complaint is factually wrong in alleging that the HES technicians have been left out of the agreement. The LTEA submits that the HES technicians are still subject to the HES Employment Terms and Conditions document for the majority of the issues pertaining to them. It denies that it purposely left the term "HES" out of the new collective agreement. It submits that, if the HES technicians had concerns in this regard, they should have first brought those concerns to the attention of the LTEA before filing a complaint under the *Code* (citing *Virginia McRae/Jackson*, 2004 CIRB 290).

[19] The LTEA asserts that it must be free to argue for changes that are in the best interests of the bargaining unit as a whole, even though it may not be in the best interest of a particular member or minority group of members. It contends that its decision-making process had concern for all of its members, including the HES technicians, and considered all of the facts surrounding the issue. Them

LTEA states that it investigated and thought through the various options, conveying them to its members for feedback and making a thoughtful judgment about whether or not to pursue the exclusion of the HES technicians from the bargaining unit. The LTEA denies that it has acted in an arbitrary or bad faith manner.

C–Rogers

[20] Rogers states that, at the time that the LTEA made its application for certification in 2010, it agreed that the HES technicians should be in the bargaining unit that the union proposed as being appropriate for collective bargaining. In September 2010, following the Board's confirmation in order no. 9868-U that the scope of the bargaining unit included the HES technicians, the parties commenced negotiations.

[21] Rogers states that, during those negotiations, the LTEA indicated that the HES technicians were not in the bargaining unit. When Rogers noted that these employees were included in the description contained in the order, the LTEA suggested that it understood it could have the order amended to exclude them. In November 2010, the LTEA asked Rogers if it would endorse the removal of the HES technicians from the bargaining unit, suggesting that these employees did not want to be in the bargaining unit. Rogers agreed. Rogers provided the Board with a copy of an unsigned draft letter of understanding that it prepared in December 2010, based on the LTEA's representations that the HES technicians did not wish to be represented by the LTEA.

[22] Rogers states that the draft letter of understanding was discussed by the parties during conciliation in May 2011, at which time the LTEA reiterated that the HES technicians did not want to be in the bargaining unit. The letter of understanding was revised during these negotiations. However, the revised letter that was signed by the parties on May 18, 2011 makes no mention of the HES technicians' wishes and states that:

> The London Technical Employees Association and Rogers Cable Communications (Inc) formally request that the CIRB alter Board order # 9868-U as follows;
>
> *Remove ... home entertainment specialist technicians.*

> The parties have recognized that current remuneration (national salary grid applications) schedules do not allow for full and meaningful representation.
>
> The parties further agree that the administration of the union is hampered in the ability by such remuneration schedules in negotiating on behalf of said employees...

[23] Rogers states that it did not send this letter of understanding to the Board, but that it met with the HES technicians on June 16, 2011 to provide them with a copy of their employment terms and conditions for the following year. It was only at this time that Rogers learned that these employees wanted to be part of the bargaining unit and covered by the collective agreement. Rogers states that, had it known this during bargaining, it would never have agreed to exclude the HES technicians, prepared the draft letter of understanding or signed the May 18, 2011 letter of understanding.

[24] Rogers indicates that it is prepared to meet with the LTEA to negotiate appropriate amendments to the collective agreement to include the HES technicians.

IV–Analysis and Decision

A–Timeliness

[25] The LTEA suggests that the HES technicians' complaint is either premature because it was filed before any application to remove them from the bargaining unit was made, or it is untimely because it was made more than 90 days after the date of the certification order that included the HES technicians in the bargaining unit. Both of these arguments misapprehend the nature of a complaint under section 37 of the *Code*. The Board finds that the HES technicians' section 37 complaint is timely, because it was made within 90 days of the date on which the HES technicians knew or ought to have known that the LTEA had failed to bargain on their behalf and removed all references to them from the collective agreement. The Board finds as a fact that the HES technicians became aware of this at the earliest when the new collective agreement was ratified by the membership in May 2011 and at the latest on June 16, 2011 when the HES technicians met with the employer. As the complaint was filed on June 17, 2011, it is clearly within the time limits prescribed in section 97(2) of the *Code*.

B–Merits of the Complaint

[26] The issue for the Board is whether the LTEA's failure to bargain on behalf of the HES technicians and its agreement to remove all reference to them in the collective agreement constitute a breach of section 37 of the *Code*. In the Board's view, the LTEA's actions constitute a breach of the *Code*, for the following reasons.

[27] Division III of the *Code* sets out the process for the acquisition and termination of bargaining rights. Sections 24 and 27 of the *Code* envision that a trade union seeking to be certified as a bargaining agent will formulate its application based on a bargaining unit that it considers appropriate for collective bargaining. The Board then reviews the proposed bargaining unit description and determines the unit that, in the Board's opinion, is appropriate for collective bargaining. If the Board is satisfied that the applicant is a trade union within the meaning of the *Code* and has the support of a majority of the employees in the unit that the Board considers appropriate, then the Board is under an obligation to certify the union as the bargaining agent.

[28] An important consequence of certification is that the certified trade union immediately assumes the exclusive authority to bargain collectively on behalf of all of the employees in the bargaining unit. The *quid pro quo* for this exclusive bargaining authority is the duty of fair representation obligation found in section 37 of the *Code*:

> 37. A trade union or representative of a trade union that is the bargaining agent for a bargaining unit shall not act in a manner that is arbitrary, discriminatory or in bad faith in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them.

[29] In this case, the LTEA states that it had been voluntarily recognized by the employer to represent the technical employees in London, including the HES technicians, for over 30 years. At the time that it applied for certification, the LTEA was party to a collective agreement with the employer for a term expiring July 31, 2010, which acknowledged that the LTEA represented the HES technicians, that the agreement superseded the HES Terms and Conditions for all non-compensation items and that the employer would consult with the LTEA and provide notice of any rate changes affecting the HES technicians 30 days prior to implementation.

[30] The definition of "trade union" in section 3 of the *Code* requires that one of the purposes of the organization must include the regulation of relations between employers and employees. Article 2 of the LTEA Constitution provides that its objective is to promote over-all working conditions through collective bargaining with Rogers, including negotiating, signing and administration of the collective agreement, and discussion of all matters involved in employer-employee relationships and any employment related matters which might improve the working conditions and general welfare of the members. This provision of the Constitution goes on to state:

> 2.1 ... On behalf of members, TEA negotiates and deals with compensation and all other matters pertaining to their employment conditions. It advises members on matters of grievances, hours, working conditions and in general strives to improve the working conditions of its members.

[31] Article 3 of the LTEA Constitution states that membership is "open to all members of the bargaining unit as delivered in the Application for Certification and thereafter the certification by the Canada Industrial Relations Board."

[32] Although the LTEA states that it had apprehensions in 2009, if not earlier, regarding its ability to represent the HES technicians, when it submitted its application for certification to the Board in March 2010, it included the HES technicians in its proposed bargaining unit. The LTEA denies ever advising the HES technicians that they had to be removed from the bargaining unit in order for the union to be certified and confirms that the HES technicians were included in the vote it held to decide whether to apply for certification.

[33] At the time of the certification application, the only classification that the employer objected to including in the bargaining unit was the network field technician; the employer did not object to the inclusion of the HES technicians in the bargaining unit.

[34] The Board found that the LTEA was a trade union within the meaning of the *Code*, that the proposed bargaining unit was appropriate for collective bargaining and that the LTEA had majority support among the employees in the bargaining unit. As the conditions of section 28 of the *Code*

were met, the Board issued certification order no. 9868-U on May 18, 2010. As of that date, the LTEA became the exclusive bargaining agent for all of the employees in a bargaining unit described as:

> ... all employees of Rogers Cable Communications Inc. employed at or from its 800 York Street, London, Ontario location, classified as material handlers, service technicians, construction technicians, system planners, network field technicians, maintenance technicians, headend technicians, platform technicians and **home entertainment specialist technicians**.
>
> (emphasis added)

[35] Nevertheless, it is common ground between the union and the employer that the LTEA did not pursue any demands on behalf of the HES technicians during the round of collective bargaining that took place following certification. The new collective agreement that was negotiated for the period August 1, 2010 to July 31, 2015, did not contain any of the references to the HES technicians that had been contained in the previous collective agreement. The Board does not accept the LTEA's submission that the HES technicians are "incorporate[d] by reference" due to the mention of order no. 9868-U in article 2.01 of the new agreement, given that there is no further reference to the terms and conditions of employment for this classification anywhere in the collective agreement.

[36] The LTEA's submissions regarding the decisions it made in collective bargaining appear to amount to an argument that it conducted a form of cost/benefit analysis and decided that it could not afford to represent the interests of the HES technicians. For all intents and purposes, the LTEA simply abandoned the interests of these employees when it informed the employer, at the bargaining table, that it wished to remove the HES technicians from its bargaining unit and asked for the employer's endorsement of an application to the Board to accomplish this objective.

[37] The LTEA did not take steps to have the HES technicians removed from its bargaining unit, and it has not done so as of this date. Therefore, the LTEA was the exclusive bargaining agent for the HES technicians at the time it engaged in collective bargaining and ultimately entered into a new collective agreement with Rogers, and it remains so at this time. Therefore, with respect to the HES technicians, the LTEA was and is subject to all of the rights and obligations contained in the *Code*, including the duty of fair representation found in section 37.

[38] The scope of the duty contained in section 37 has been a matter of some debate over the years. However, it now appears to be settled law that, in certain circumstances, the duty can extend to the process of collective bargaining. In *Reynolds et al.* (1987), 68 di 116 (CLRB no. 607), a decision of the Board's predecessor, the Canada Labour Relations Board (CLRB), the CLRB stated:

> It seems to us that the rationale behind the *Parsley* and the *Harris* decisions is basically sound considering what Parliament was attempting to legislate, i.e., to avoid collective agreements being placed in jeopardy via proceedings before the Board under section 136.1 [now section 37]. The *Harris* decision is a sensible step away from the broad assertion made in the *Parsley* decision and the other decisions which followed to the effect that negotiations in general have been removed from the ambit of section 136.1 [now section 37]. Having said that, however, we are only too well aware that the present construction of section 136.1 [now section 37] is open for a broader interpretation than given in *Parsley* and *Harris*. To rely upon the words, "in the representation of any of the employees in the unit with respect to their rights under the collective agreement that is applicable to them," to remove negotiations from the scope of section 136.1 [now section 37] is to skate on pretty thin ice. Every time a bargaining agent sits down at a bargaining table it is representing the employees in the bargaining unit. A compelling argument could therefore be made that only negotiations for a first collective agreement have been excluded. Once employee rights have been established in a first collective agreement it is not a big step to construe that thereafter a bargaining agent is representing employees in the bargaining unit, "with respect to their rights under the collective agreement that is applicable to them," each time those rights are up for renewal. More often than not collective agreements themselves provide that they continue in effect while negotiations are proceeding for their renewal. . . . It is not uncommon then for negotiations to be going on while the collective agreement is still in effect. It requires a very narrow interpretation of the wording of section 136.1 [now section 37] to say that in those circumstances the bargaining agent is not representing the employees in the bargaining unit with respect to their rights under the collective agreement that is applicable to them.
>
> (at pp. 126-127)

[39] In *George Cairns et al.*, 1999 CIRB 35 (RD 35), the Board found that a certified bargaining agent was guilty of breaching section 37 of the *Code* when it failed to fulfill its institutional role as bargaining agent for all of its members following the merger of two bargaining units. In that case, the Board had merged bargaining units of locomotive engineers and conductors previously represented by different bargaining agents. It subsequently certified one of the bargaining agents, the Brotherhood of Locomotive Engineers (BLE), as the bargaining agent for the merged unit. In reaching its determination that the BLE had breached section 37 of the *Code* when negotiating a Crew Consist Adjustment Agreement with VIA Rail, the Board noted that, despite its certification as representative of both groups, the BLE had followed a course of action designed to keep the two groups separate. The Board extensively reviewed the scope of the duty of fair representation at paragraphs 104 to 115 of RD 35, and stated the following:

[106] **The duty of fair representation has both a procedural and a substantive component. The substantive component attaches to the effect of the union's actions, the consequences of which could be arbitrary, discriminatory or in bad faith, even though they appear to be legitimate, for example when they result in the exclusion of a particular group from the benefits of the collective agreement.** On the other hand, procedural violations include decisions made by the bargaining agent that adversely affect the interests of an individual or minority group of employees as the result of a process that is tainted by hostility, ill-will, discrimination or bad faith. Thus, it is essential that both the process and the substance of the decision be free from arbitrariness or bad faith.

[107] The duty of fair representation may also be assessed by a three-pronged test. Has the union fulfilled its institutional role in representing all its members? Were employee rights within the regime of collective bargaining appropriately protected? Were critical job interests such as seniority, discipline and job security suitably considered in the collective bargaining process?

(emphasis added)

[40] RD 35 was upheld by the Federal Court of Appeal in *VIA Rail Canada Inc. v. Cairns*, 2001 FCA 133; [2001] 4 FC 139, in which the Court stated:

[52] Section 37 imposes upon a union a duty to fairly represent its members in the representation of the rights that they have acquired by virtue of the collective agreement that is applicable to them. This does not necessarily relieve the union from such a duty outside the term of a collective agreement. Indeed, once notice of collective bargaining has been given, the terms or conditions of employment or any right or privilege of the employees in a bargaining unit are frozen by paragraph 50*(b)* until the parties gain the right to strike or lockout in accordance with section 89 [as am. by S.C. 1998, c. 26, s. 39; 1999, c. 31, s. 157]. The statutory freeze would have no meaning unless those terms, conditions, rights or privileges which are its object have a source. That source is the former collective agreement. Thus, the union has a duty, during a freeze period, to fairly represent its members with respect to the terms, conditions, rights or privileges that are protected from alteration by paragraph 50*(b)*.

[53] I have no doubt that the duty of fair representation extends to the administration of the frozen matters. The question is whether this duty can extend to the union's actions during collective bargaining that takes place during the freeze period.

[54] VIA and the BLE argue that extending the duty of fair representation to collective bargaining offends the principle of free collective bargaining. They argue that such an extension would destroy the necessary give and take of contract negotiations by restraining the union from bargaining away any existing rights. I disagree. The existence of a duty of fair representation does not preclude a union from making concessions with respect to existing rights or privileges of its members in order as part of the bargaining process. **What it does do, is to require that the union, in making those concessions not act in a manner that is arbitrary, discriminatory or in bad faith during the collective bargaining process.**

(emphasis added)

[41] The duty of fair representation does not require that a union achieve a particular outcome in collective bargaining. As the Board stated in *Vergel Bugay*, 1999 CIRB 45:

> [41] With respect to collective bargaining itself, unions are generally subject to a minimal level of scrutiny. They are considered to have a broad discretion in fashioning bargaining demands that may disregard the wishes of individuals or minority groups. They may trade off subjects they believe to be appropriate, including individual grievances, or agree to terms and conditions that adversely affect individuals or groups of employees.

[42] However, in formulating demands and making the compromises that a bargaining agent is required to make in collective bargaining, the Board requires that the process and result of the decisions that the union makes must be free of improper motive (see *Reynolds et al.*, *supra*). The Board described this balancing exercise in *George Cairns et al. (RD 35)*, *supra*, as follows:

> [113] The weighing of interests and the ultimate choices are without a doubt highly political and will inevitably be influenced by competing preferences, values and viewpoints. However, **the union will be judged on whether it approached the issue objectively and acted responsibly towards all its members. It must take a reasonable view of the problem and thoughtfully assess the various and conflicting interests.**
>
> (emphasis added)

[43] In the instant case, the evidence indicates that the LTEA made a conscious decision during the 2010-11 round of collective bargaining that, despite its certification order, it did not wish to represent the HES technicians. Rather than taking steps to remove itself as the exclusive bargaining agent for these employees, it simply abandoned them. While there is no evidence before the Board that this decision was taken in bad faith, the Board is of the opinion that the union's decision was arbitrary, and thus a violation of section 37 of the *Code*. As the Board stated in *Virginia McRae Jackson*, *supra*:

> [30] It is arbitrary to only superficially consider the facts or merits of a case. It is arbitrary to decide without concern for the employee's legitimate interests. ... A non-caring attitude towards the employee's interests may be considered to be arbitrary conduct... as may be gross negligence and reckless disregard for the employee's interests...

[44] Not only did the LTEA fail to advance the interests of the HES technicians during bargaining, it actively participated in depriving them of the few rights that they did have under the previous collective agreement, as set out in paragraph [3] above. There is no evidence that the union

endeavoured to maintain the existing terms and conditions of employment for the HES technicians, let alone to improve them. On the contrary, the union ensured that all mention of the HES technicians was removed from the collective agreement, with no reasonable explanation. While the union states the decision was taken in the best interest of the bargaining unit as a whole, it has not provided any explanation or justification as to how excluding an entire occupational group, which it was legally required to represent, from the collective agreement, would be in the interest of the bargaining unit as a whole. In treating the HES technicians as it did, the LTEA acted in a discriminatory manner and clearly breached all of the elements of the test established by the Board in *George Cairns*, *supra*:

(1) the LTEA did not fulfill its institutional role to represent all of its members;

(2) the LTEA did not protect the rights of the HES technicians within the regime of collective bargaining; and

(3) the critical job interests of the HES technicians, such as seniority, discipline and job security, were not considered by the LTEA in any way.

[45] The Board therefore finds that, in the egregious circumstances of this case, the LTEA has acted in an arbitrary and discriminatory manner, thereby breaching the duty of fair representation that it owes to the HES technicians in violation of section 37 of the *Code*.

C–Remedy

[46] In its response to the complaint, the employer indicated that it is prepared to meet with the LTEA to negotiate appropriate amendments to the collective agreement to include the HES technicians.

[47] As remedy for the LTEA's violation of the *Code*, it is hereby directed to meet with the employer within 20 days of this decision for the purpose of negotiating such amendments. In the event that the parties are unable to reach agreement on such amendments within 90 days of the date of this decision, any unresolved matters are to be submitted to a sole interest arbitrator, jointly selected by the union and the employer, for final and binding determination. The fees and expenses of any such interest arbitrator are to be born in equal parts by the union and the employer.

[48] The Board hereby retains jurisdiction to deal with any questions arising from the implementation of this decision.

[49] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

André Lecavalier
Member

Norman Rivard
Member